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December 16, 1999

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Ms. Magalie Roman Salas
Office of the Secretary
Federal Communications Commission
445 - 12th Street S.W., TW-A325
Washington, D.C. 20554

Dear Ms. Salas:

**RE: Michigan Pay Telephone Association,
Federal Communications Commission No. 99-35**

Enclosed for filing are an original and four copies of the Comments of the Michigan Public Service Commission in Response to the Michigan Pay Telephone Association's Petition for Declaratory Ruling.

Very truly yours,

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Atts.

c: Parties of Record
fcc/99-35/Ltr

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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

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In the Matter of

CC Docket No. 96-128

Implementation of the Pay Telephone Reclassification
and Compensation Provisions of the Telecommunications
Act of 1996.

CCB/CPD No. 99-35

The Michigan Pay Telephone Association's Petition for
Declaratory Ruling Regarding The Prices Charged by
Ameritech Michigan and GTE North, Inc. for Network
Access Services Made Available to Payphone Provides
in Michigan.

**COMMENTS OF THE MICHIGAN PUBLIC SERVICE COMMISSION
IN RESPONSE TO THE MICHIGAN PAY TELEPHONE ASSOCIATION'S
PETITION FOR DECLARATORY RULING**

On November 12, 1999, the Federal Communications Commission (Commission) issued a notice that the Michigan Pay Telephone Association had filed a petition for declaratory ruling. The notice provided that written comments by interested parties must be filed no later than December 17, 1999, with reply comments to be filed no later than January 5, 2000. In accordance with that schedule, the Michigan Public Service Commission (MPSC) submits its initial comments.

Procedural History

On August 10, 1998, the Michigan Pay Telephone Association (MPTA) filed a complaint with the Michigan Public Service Commission regarding the payphone services offered by Ameritech Michigan (Ameritech) and GTE North, Inc. (GTE). MPTA requested that the MPSC determine whether Ameritech and GTE complied with provisions of the Michigan Telecommunications Act (MTA), M.C.L. 484.2201 *et seq.*; M.S.A. 22.1469(101) *et seq.*, the Communications Act of 1934, as amended by the Telecommunications Act of 1996 (FTA), 47

U.S.C. §§ 151 *et seq* and orders issued by the Federal Communications Commission (FCC). The complaint involved three major issues: (1) whether the prices for network services are consistent with the new services test adopted by the FCC;¹ (2) whether the payphone operations of Ameritech and GTE are required to pass an imputation test pursuant to Section 362 of the MTA, M.C.L. 484.2362; M.S.A. 22.1469(362); and (3) whether the payphone services provided to independent payphone providers (IPPs) are discriminatory.

On August 28, 1998, Ameritech and GTE filed responses to the complaint. In addition, AT&T Communications of Michigan, Inc. (AT&T) and MCI Communications Corporation (MCI) filed petitions for, and were granted, leave to intervene. Hearings were held by an administrative law judge (ALJ) on November 9, 10, 16, 17, 18 and 19, 1998. The record consists of more than 1,600 pages of transcript and 45 exhibits.

The MPTA, Ameritech, GTE, MCI and AT&T filed briefs on December 9, 1998. On December 23, 1998, the MPTA, Ameritech, GTE, MCI and AT&T filed reply briefs. On February 16, 1999, the ALJ issued a proposal for decision (PFD). Exceptions to the PFD were filed by the MPTA, Ameritech, GTE and MCI on February 23, 1999. On March 1, 1999, replies to exceptions were filed by the MPTA, Ameritech, GTE, MCI and AT&T. On March 8, 1999, the MPSC issued its Order.

¹The new services test is codified at 47 C.F.R. § 61.49(f)(2), which states:

Each tariff filing submitted by a local exchange carrier specified in § 61.41(a)(2) or (3) of this part that introduces a new service or a restructured unbundled basic service element (BSE) (as BSE is defined in § 69.2(mm)) that is or will later be included in basket must be accompanied by cost data sufficient to establish that the new service or unbundled BSE will not recover more than a reasonable portion of the carrier's overhead costs. (Emphasis added).

In the March 8, 1999 Order, the MPSC rejected the MPTA's claim that Ameritech and GTE had failed to comply with the new services test.² The MPTA moved for rehearing on April 12, 1999. Ameritech and GTE opposed the motion for rehearing in responses filed on April 28, 1999. On May 11, 1999, the MPSC issued an order denying the motion for rehearing.

The MPTA filed a claim of appeal with the Michigan Court of Appeals (Docket No. 219950) on June 3, 1999. On August 27, 1999, the MPTA filed their appellate brief with the Michigan Court of Appeals. The MPSC and Ameritech filed their briefs with the Michigan Court of Appeals on November 29, 1999. On December 7, 1999, the MPTA filed a motion with the Michigan Court of Appeals asking the court to extend the due date for the MPTA reply brief until 21 days after this Commission has ruled on the MPTA Petition for Declaratory Ruling.

The MPTA's Petition for Declaratory Ruling seeks to "end run" the MPSC's regulatory procedures.

In the complaint filed by the MPTA with the MPSC, the MPTA alleged that Ameritech and GTE's rates for network services made available to IPPs did not comply with the new services test. The underlying premise to the MPTA's claim is that the new services test is a rigid standard which can be applied in only one way.

The MPSC addressed the MPTA's complaint in accordance with Section 318 of the MTA which provides:

- (1) A provider of basic local exchange service shall not discriminate in favor of its or an affiliate's payphone service over similar services offered by another provider.

²The MPSC's March 8, 1999 Order also rejected MPTA's claim that Ameritech and GTE had discriminated against IPPs. The March 8, 1999 Order did provide that the payphone operations of Ameritech and GTE are required to pass an imputation test pursuant to Section 362 of the MTA. The MPTA's Petition for Declaratory Ruling only challenges the MPSC's determination regarding the new services test.

- (2) A provider of payphone service shall comply with all nonstructural safeguards adopted by the Federal Communications Commission for payphone service.

M.C.L. § 484.2318; M.S.A. § 22.1469(318). When addressing non-structural safeguards, Michigan law is clear and consistent with federal law: the standards set by this Commission are controlling.

In the Payphone Rulemaking Proceeding,³ this Commission adopted specific provisions involving rate-making envisioned by Section 318 of the MTA. The conclusions reached by this Commission in the Payphone Rulemaking Proceeding were based upon Section 276 of the FTA which provides in pertinent part:

- (a) Non discrimination Safeguards.- After the effective date of the rules prescribed pursuant to subsection (b), any Bell operating company that provides payphone service –

- (1) shall not subsidize its payphone service directly or indirectly from its telephone exchange service operations or its exchange access operations; and
(2) shall not prefer or discriminate in favor of its payphone service.

- (b) Regulation.-

- (1) Contents of Regulations.- In order to promote competition among payphone service providers and promote the widespread deployment of payphone services to the benefit of the general public, within 9 months after the date of enactment of the Telecommunications Act of 1996, the Commission shall take all actions necessary (including any reconsideration) to prescribe regulations that-

* * *

- (C) prescribe a set of nonstructural safeguards for Bell operating company payphone service to implement the provisions of paragraphs (1) and (2) of subsection (a), which safeguards shall, at a minimum, include the nonstructural safeguards equal to those adopted in the Computer Inquiry III (CC Docket No. 90-623) proceeding...

³*Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, Report and Order, FCC 96-388 (Sept. 20, 1996), *appeal docketed sub nom, Illinois Public Telecommunications Assoc. v FCC and United States*, Case No. 96-1394 (D.C. Cir., Oct. 17, 1996), *recon*, FCC 96-439 (Nov. 8, 1996; Order DA 97-678).

47 U.S.C. § 276 (emphasis added).

Specifically, this Commission established the standard for evaluating a local exchange carrier's (LEC) rates for payphone services:⁴

We require LECs to file tariffs for the basic payphone services and unbundled functionalities in the intrastate jurisdictions as discussed below. LECs must file intrastate tariffs for these payphone services and any unbundled features they provide to their own payphone services. The tariffs for these LEC payphone services must be: (1) cost based; (2) consistent with the requirements of Section 276 with regard, for example, to the removal of subsidies from exchange and exchange access services; and (3) nondiscriminatory. States must apply these requirements and the Computer III guidelines for tariffing such intrastate services.

By referencing the *Computer III* proceedings, this Commission specified the manner by which state commissions determine whether rates are cost based, as the *Computer III* proceedings incorporated this Commission's new services test.

With regard to a LEC's provision of payphone services, the new services test is codified at 47 C.F.R. § 61.49(f)(2) which provides:⁵

Each tariff filing submitted by a local exchange carrier specified in § 61.41(a)(2) or (3) of this part that introduces a new service or a restructured unbundled basic service element (BSE) (as BSE is defined in § 69.2(mm)) that is or will later be included in basket must be accompanied by cost data sufficient to establish that the new service or unbundled BSE will not recover more than a reasonable portion of the carrier's overhead costs. (Emphasis added).

Consequently, the Commission has established a procedure and framework for complying with the ratemaking requirements from the Payphone Rulemaking Proceeding. The MPSC, applying this procedure to the MPTA's complaint, determined that the MPTA had failed to demonstrate

⁴Reconsideration Order, ¶ 163 emphasis added.

⁵Although the new services test, in theory, was designed to test the appropriateness of rates for truly new services (services to be introduced for the first time) this Commission, in the Payphone Rulemaking Proceeding Reconsideration Order, opted to treat payphone services as if they were new services.

that Ameritech and GTE had failed to submit statistical data to demonstrate that their payphone rates are: (1) cost based; (2) do not include subsidies; and (3) recover a reasonable portion of overhead.

Based upon the review of the record and the arguments advanced, the MPSC concluded that the MPTA failed to demonstrate that Ameritech and GTE's payphone service rates were not in compliance with the new services test:

The Commission [MPSC] is not persuaded that the MPTA's approach is required by the new services test or that its results are preferable to the rates now in place. In particular, the Commission [MPSC] rejects the MPTA's position that the retail services sold to the IPPs should be compared to the wholesale unbundled network elements sold to providers of basic local exchange service, which were priced in Cases Nos. U-11280 and U-11281. In fact, the services that Ameritech Michigan and GTE sell to the IPPs are not wholesale services, and the IPPs are business customers.² Consequently, it cannot be said that the rates for payphone services must include no more than the overheads that are allocated to unbundled network elements or that it is impermissible to compare payphone and business rates. To the contrary, the Commission [MPSC] finds that it is both appropriate and reasonable to consider the relationship between the rates that Ameritech Michigan and GTE charge for a payphone line and a business line. **The record demonstrates that the rates are the same or very similar, and any differences are justified by the differences in the services provided.** The Commission [MPSC] therefore concludes that the MPTA has failed to prove that payphone services are priced at more than cost plus a reasonable overhead.

²The Commission's [MPSC] October 1, 1985 order in Case No. U-8056, which approved Ameritech Michigan's first payphone tariff, treated payphone customers as a class of business customers and set the rates accordingly.

(MPSC Case No. U-11756, Opinion and Order, p 8 (March 8, 1999); emphasis added.) As the foregoing excerpt demonstrates, the MPSC's decision rejecting the MPTA's complaint rested on several district points:

- that the FCC had not identified any particular methodology for determining costs or reasonable overheads for purposes of compliance with the new service test;

- that MPTA had sought to compare apples to oranges when it argued that retail services sold to IPPs should be compared to wholesale unbundled network elements sold providers of basic local exchange;
- that services sold to the IPPs are not wholesale services but rather that IPPs are business customers;
- that it was appropriate and reasonable to consider the relationship between the rates Ameritech and GTE charge for a payphone line and a business line; and,
- that the record demonstrated that payphone and business rates were the same or very similar and that any differences were justified by the differences in the services provided.

These findings by the MPSC demonstrate that it properly applied applicable state and federal law when addressing the issues raised in the MPTA complaint.

The MPTA disagreed with the MPSC's decision and filed a claim of appeal in the Michigan Court of Claims pursuant to Michigan law, M.C.L. 484.2203(7); M.S.A. 22.1469(203)(7), Section 203 of the MTA, and M.C.L. 462.26(1); M.S.A. 22.45(1), Section 26 of the Railroad Commission Act. In the Petition for Declaratory Ruling filed by the MPTA with this Commission, the MPTA alleges several substantive errors were made by the MPSC in applying the new services test to the network services made available by Ameritech and GTE to IPPs. (See MPTA Petition, pgs. 12-21.) While the MPSC continues to assert that it has in fact committed no error, the Michigan Court of Appeals is the proper forum to address the alleged errors raised by the MPTA.⁶ Having failed to obtain the relief sought from the MPSC, the MPTA now seeks to obtain a "second bite at the apple" from this Commission. The MPTA petition is premature because the state regulatory process has not been completed. The MPTA

⁶A review of the MPTA Petition for Declaratory Ruling reveals that, as was the case with the complaint filed with the MPSC, no reason(s) have been presented to support deviating from the flexible new services test methodology endorsed by this Commission, other than the MPTA's belief that rates are too high.

petition should be dismissed, and the MPSC should be permitted to handle the matter which has been entrusted to it by this Commission in its *Payphone Orders*.

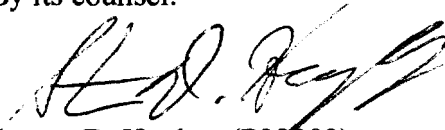
Conclusion

The MPSC did not err when it denied the complaint filed by the MPTA and its members. If any substantive error has occurred, the MPTA is entitled to, and has sought, relief in the Michigan Court of Appeals. The MPSC requests that the MPTA petition be dismissed. If this Commission elects to consider the petition, the MPSC requests that this Commission determine that the March 8, 1999 Order issued in Case No. U-11756 is consistent with the new services test mandated by 47 C.F.R. § 61.49, the Commission's orders, and 47 U.S.C. § 276.

Respectfully submitted,

MICHIGAN PUBLIC SERVICE COMMISSION

By its counsel:



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DATED: December 16, 1999

99-35/Comments

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in Michigan.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document entitled COMMENTS OF THE MICHIGAN PUBLIC SERVICE COMMISSION IN RESPONSE TO THE MICHIGAN PAY TELEPHONE ASSOCIATION'S PETITION FOR DECLARATORY RULING in accordance with the directive of the Federal Communications Commission, an original and four copies have been filed with the Commission's Secretary. In addition, one copy have been filed/served upon the following:

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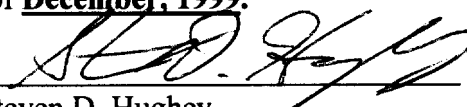
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Dated at Lansing, Michigan, this 16th day of December, 1999.


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